**IN THE COURT OF CRIMINAL APPEALS**
**OF TEXAS**

**NO. WR-78,107-02**

**EX PARTE KOSOUL CHANTHAKOUMMANE, Applicant**

**ON APPLICATION FOR WRIT OF HABEAS CORPUS**
**CAUSE NO. W380-81972-07-HC2 IN THE 380TH DISTRICT COURT**
**COLLIN COUNTY**

***Per curiam*. NEWELL, J., filed a dissenting opinion in which RICHARDSON and WALKER, JJ, joined.**

**O R D E R**

This is a subsequent application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071, § 5.

In October 2007, a jury convicted Applicant of the offense of capital murder for murdering a person in the course of committing or attempting to commit robbery. TEX. PENAL CODE § 19.03(a)(2). Specifically, Applicant was convicted of murdering and robbing real estate agent Sarah Walker on July 8, 2006, in a model home where she

worked in McKinney, Texas. The medical examiner who conducted the autopsy testified at trial that Walker sustained several blunt force injuries to her head, multiple bruises on her face, a broken nose, fractured teeth, defensive wounds, a bitemark on her neck, and 33 stab wounds. DNA evidence placed Applicant at the crime scene. Applicant's blood, either alone or in a mixture, was found in numerous areas inside the model home and under Walker's fingernails.

Walker's ring and newly purchased Rolex watch were missing when her body was found. Photographs taken from a bank surveillance video showed Walker wearing the watch and ring an hour and a half before her murder. The State presented evidence that Applicant was in financial trouble at the time of the offense, which it offered as a motive for robbing Walker.

Two eyewitnesses — realtor Mamie Sharpless and her husband Nelson Villavicencio — also placed Applicant at the crime scene. Sharpless called the McKinney police department the day after the murder to report the details of a suspicious encounter they had with a man outside the model home before the offense. She reported that they had driven to the area to meet a man who had called Sharpless from a pay telephone that morning asking to view a townhome. The man said his name was "Chan Lee" and he was relocating from North Carolina. When they arrived at the townhome, no one was there, so they waited in their car until a man driving a white Mustang passed by them and parked in front of the model home. As the man was walking toward the model

home, they drove up and asked him if he was Chan Lee. The man answered "no." Sharpless described him as a muscular Asian male with a buzz cut, about 5' 7" to 5' 9" tall, and wearing a blue shirt. She reported that the white Mustang was parked in front of the model home when they left the area about an hour later, which was just prior to the discovery of Walker's body.

During the State's investigation, Sharpless and Villavicencio consented to undergo hypnosis by a Texas Ranger to see if they could provide any additional details. They were unable to provide additional information, but Villavicencio assisted a forensic sketch artist with a composite sketch of the suspect after his hypnosis session. The composite sketch was released to the public along with a description of the suspect's white Mustang. The State presented both eyewitnesses at trial, who identified Applicant and testified about their encounter with him. Their trial testimony was consistent with their original reports, but for variances in their estimation of Applicant's height.

Another female realtor provided information to police which led to the apprehension of Applicant two months after Walker was murdered. The realtor, who had previously helped Applicant find an apartment, reported that Applicant came to her home the night before the instant offense and repeatedly banged on her doors. At the time of his arrest, Applicant had healing wounds on his hands and arms. Applicant admitted being in the model home on the day of the offense and provided other details that corroborated the accounts of Sharpless and Villavicencio.

The State presented testimony from a dental expert, Brent Hutson, who testified that he examined Applicant and made impressions of his teeth. Hutson testified that he compared Applicant's teeth with the bitemark and concluded that Applicant made the bitemark on Walker's neck "within reasonable dental certainty beyond a doubt." The State mentioned the bitemark in its closing argument at the guilt phase to show the brutality of the offense.

The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Chanthakoummane v. State*, No. AP-75,794 (Tex. Crim. App. Apr. 28, 2010) (not designated for publication).

Applicant filed his initial application for a writ of habeas corpus in the trial court on April 5, 2010. This Court denied relief. *Ex parte Chanthakoummane*, No. WR-78,107-01 (Tex. Crim. App. Jan. 30, 2013) (not designated for publication). Applicant then exhausted his federal post-conviction appeals without relief, after which the trial court set an execution date for July 19, 2017.

On January 13, 2017, Applicant filed in the trial court this subsequent application for a writ of habeas corpus.[1] Applicant has raised four claims for relief, all based on

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[1] Applicant filed in the trial court a second subsequent application for a writ of habeas corpus on May 13, 2019. That application remains pending in this Court.

purportedly recent advances in science that he alleges have discredited the State's eyewitness testimony, bitemark evidence, and DNA evidence used against him at trial, including a claim that he is actually innocent.

Applicant presented evidence from Stephen Lynn, Ph.D., a forensic psychologist with expertise in hypnosis, to discredit the trial testimony of Sharpless and Villavicencio. He presented evidence from Dr. C. Michael Bowers, a forensic odontologist, to show that the scientific community has now disavowed individualized bitemark pattern matching. And Applicant relied on two discoveries that were made in the scientific field of DNA analysis in 2015 to discredit the DNA evidence presented at trial: (1) errors in the Federal Bureau of Investigation's DNA database; and (2) flawed statistical methodology utilized by the Texas Department of Public Safety in DNA mixture cases.

On June 7, 2017, we held that Applicant "satisfied the successive filing requirements of Article 11.071, § 5." We stayed the execution and remanded the cause to the trial court for review of the issues raised.

After holding a hearing, the trial court signed findings of fact and conclusions of law recommending that relief be denied. We have reviewed the record, and we agree that Applicant is not entitled to relief.

In his first claim, Applicant asserts that the State's use of discredited sciences at trial entitles him to relief under Article 11.073. Article 11.073 provides that an applicant is entitled to post-conviction relief if he can prove that:

> ( 1) Relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial;
>
> (2) The scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and
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> (3) The court must make findings of the foregoing and also find that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

Art. 11.073(b)(1) & (2). Applicant is also subject to the diligence standards set forth in Article 11.073(c) & (d):

> (c) For purposes of . . . Section 5(a)(1), Article 11.071 . . . a claim or issue could not have been presented previously in an original application or in a previously considered application if the claim or issue is based on relevant scientific evidence that was not ascertainable through the exercise of reasonable diligence by the convicted person on or before the date on which the original application or a previously considered application, as applicable, was filed.
>
> (d) In making a finding as to whether relevant scientific evidence was not ascertainable through the exercise of reasonable diligence on or before a specific date, the court shall consider whether the field of scientific knowledge, a testifying expert's scientific knowledge, or a scientific method on which the relevant scientific evidence is based has changed since [the trial or the date on which the initial application or a previously considered application was filed.]

Applicant has failed to meet these requirements. At the evidentiary hearing, the State presented recalculated DNA statistics under the current standards. The statistical calculations matching Applicant's DNA profile in the single-source samples did not change. Although the statistical calculations in the mixed source samples changed,

Applicant was still included as a contributor to those samples. The recalculated results continue to show that Applicant was at the crime scene and that his DNA was under Walker's fingernails. Thus, Applicant has failed to demonstrate that, had the recalculated DNA results been presented at trial, on the preponderance of the evidence he would not have been convicted. Art. 11.073(b)(2).

Further, Bowers's bitemark testimony at the evidentiary hearing was consistent with our opinion in *Ex parte Chaney*, 563 S.W.3d 239 (Tex. Crim. App. 2018), in which we recognized the scientific community's changed standards discrediting bitemark comparisons. Under the new standards, Hutson's bitemark comparison testimony would not have been admissible. However, we agree with the trial court's assessment that, even without the bitemark comparison testimony, the jury still would have convicted Applicant based on the strength of the remaining evidence. *See* Art. 11.073(b)(2).

Finally, Applicant has failed to establish that the critiques against hypnotism in a forensic setting contained in recent scientific studies were not known and available at the time of Applicant's trial, pursuant to Article 11.073(b)(1)(A). State's witness David Spiegel, M.D., a psychiatrist with expertise in hypnosis, disputed Applicant's contention that recent studies have changed the field of scientific knowledge. Spiegel testified at the evidentiary hearing that the same myths and risks associated with using hypnosis to assist with memory recall have been well known in the scientific field since at least the mid-1980s. Spiegel's testimony was corroborated by the State's introduction of studies and

articles from that time period.

In his second and third claims, Applicant asserts that the bitemark evidence, hypnotically enhanced testimony, and DNA evidence presented at his trial constitute false evidence that the State used to secure his conviction and death sentence in violation of his Fourteenth Amendment rights to due process and a fundamentally fair trial. In these claims, Applicant must show by a preponderance of the evidence that (1) false evidence was presented at his trial and (2) the false evidence was material to the jury's verdict. *See Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015), *citing Ex parte Weinstein*, 421 S.W.3d 656, 659, 665 (Tex. Crim. App. 2014). Whether evidence is false turns on whether the jury was left with a misleading or false impression after considering the evidence in its entirety. *Weinstein*, 421 S.W.3d at 665-66. We review factual findings concerning whether a witness's testimony is false under a deferential standard, but we review *de novo* the ultimate legal conclusion of whether such testimony was "material." *See id.* at 664. False testimony is "material" only if there is a "reasonable likelihood" that it affected the judgment of the jury. *Id.* at 665.

The trial court found that the DNA evidence and eyewitness testimony were not false. The trial court found that the recalculated DNA statistics still showed that Applicant was at the crime scene and his blood was under Walker's fingernails. Further, the recalculated DNA statistics did not weaken the overall strength of the evidence linking Applicant to the murder. The trial court also found that the trial testimony of

Sharpless and Villavicencio was consistent with their pre-hypnosis accounts. We defer to the trial court's findings, which are supported by the evidence.

The trial court found that Hutson's testimony identifying Applicant as the source of the bitemark was false, but that it was not material because it "played a minimal role" in linking Applicant to Walker's murder. Based on a *de novo* review, we agree. The bitemark comparison testimony was not the linchpin of the State's case. The linchpin of the State's case was the DNA evidence found at the scene and under Walker's fingernails. The State also relied on Applicant's admissions, the eyewitness accounts, and other circumstantial evidence linking Applicant to the murder. Due to the combined strength of this evidence, Applicant has failed to show a reasonable likelihood that the bitemark comparison testimony affected the jury's judgment. *Cf. Ex parte Chaney*, 563 S.W.3d 239 (Tex. Crim. App. 2018). In sum, because the State's evidence was either not false or not material, Applicant has failed to show that he is entitled to relief.

Finally, with regard to his actual innocence claim, Applicant has a "Herculean" burden to prove by clear and convincing evidence that no reasonable juror would have convicted him based on the new evidence. *Ex parte Elizondo*, 947 S.W.2d 202, 210 (Tex. Crim. App. 1996); *Ex parte Brown*, 205 S.W.3d 538, 545 (Tex. Crim. App. 2006). We agree with the trial court's conclusion that Applicant failed to meet this burden. Applicant is not entitled to relief.

Accordingly, we adopt the trial court's findings of fact and conclusions of law, and

we deny relief on all of Applicant's claims.

IT IS SO ORDERED THIS THE 7th DAY OF OCTOBER, 2020.

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